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In the Supreme Court of the United States

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners raised a genuine issue of fact as to whether there was reasonable cause for their failure timely to file 1978 and 1979 federal income tax returns.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 920 F.2d 301. The opinion of the district court (Pet. App. 28a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1991. A petition for rehearing was denied on January 30, 1991 (Pet. App. 43a). A motion for leave to file a suggestion for rehearing en banc out of time was denied on April 22, 1991 (Pet. App. 44a). A suggestion for reconsideration of the order of April 22, 1991, was denied on May 20,

1991.[1] The petition for a writ of certiorari was filed on April 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Victor Denenburg and his brothers owned a corporation engaged in the equipment-leasing business.[2] In 1978, petitioner agreed to purchase his brothers' interests in the corporation. Petitioner used corporate funds to purchase their stock. Petitioner's accountant informed him that this use of corporate funds created taxable income for him because it would be treated as a constructive dividend. The accountant advised petitioner that he could avoid a tax on the constructive dividend by amending the stock purchase agreement to provide for purchase of the stock directly by the corporation. Petitioner was unable, however, to negotiate such an amendment with his brothers (Pet. App. 3a-4a).

Petitioners obtained extensions for the filing of their 1978 and 1979 federal income tax returns but failed to meet the extended deadlines. When petitioners thereafter made untimely filings of their returns, the Internal Revenue Service assessed failure-to-file penalties against petitioners under Section 6651(a)(1) of the Internal Revenue Code, 26 U.S.C.

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[1] This order was entered after petitioners filed their petition for a writ of certiorari and is therefore not included in the appendix to the petition. Accordingly, a copy of that order is reproduced in the appendix to this brief (App., *infra*, 1a-4a).

[2] Sandra J. Denenburg, wife of Victor D. Denenburg, is a party in this suit solely because the Denenburgs filed joint returns for 1978 and 1979. The references to petitioner in this brief are to Victor D. Denenburg.

6651(a)(1). Petitioners paid those penalties and, after their administrative claim for refund was denied by the Internal Revenue Service, filed this action (Pet. App. 4a-5a, 24a n.10).

2. Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for a failure to file a tax return by the date due "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. 6651(a)(1). Petitioners asserted in the district court that they had reasonable cause for failing to file their 1978 and 1979 income tax returns within the extended deadlines because their accountant advised them that it was permissible for them to file the returns late. Both parties moved for summary judgment. Transcripts of a deposition of petitioner and a deposition and affidavit of his accountant were filed with the court. The deposition of the accountant contains the following colloquy (Pet. App. 23a):

> Q. Did you ever advise [Mr. Denenburg] with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A. I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially—and we knew it to be incorrect—was not certainly not what we as a firm would propose to do.

The district court granted summary judgment for the government (Pet. App. 28a-41a), holding that petitioners failed to establish a genuine issue of fact as to whether they had reasonable cause for their

failure to file the returns by the due dates because (1) there was no evidence that the accountant advised petitioners that they were not required to file the returns and (2) the reluctance of the accountant to file *improper* returns does not constitute reasonable cause for a failure to file a return as required by law (Pet. App. 38a-39a).

3. The court of appeals affirmed (Pet. App. 1a-27a). The court reviewed the evidence *de novo*, in the light most favorable to petitioners, and concluded that the accountant never advised petitioners that it was unnecessary to file the returns by the deadlines. Petitioners had thus failed to establish reasonable cause for their failure to make timely filings (Pet. App. 26a-27a).

In arriving at its decision, the court described the accountant's testimony as follows (Pet. App. 26a):

> Like his deposition testimony, the CPA's affidavit gallantly straddles the fence in a vain effort to support his client's failure to file returns timely, without at the same time inculpating the CPA's firm or perjuring himself.
>
> The inescapable conclusion from careful readings of the depositions and affidavits is that the CPA never clearly and expressly advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed despite- knowledge of the final, unextendable deadlines.

Since petitioners lacked evidentiary support for their claim that the accountant advised them that it would be permissible to file the returns after the extended deadlines, the court found it unnecessary to reach the question whether such advice could constitute reasonable cause for the failure to file timely returns (Pet. App. 19a-20a).

Petitioners filed numerous post-appeal motions for rehearing in which they urged that the accountant's deposition testimony (quoted above) provides support for their claim that he advised petitioners to file the returns late (App., *infra*, 1a-4a). In these motions, as in the petition filed in this Court (Pet. 14, 15), petitioners' counsel asserted that the accountant answered: "*I am certain that I said that.*" In denying these motions, the court of appeals felt compelled to "try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal" (App., *infra*, 2a). The court noted that "[c]ounsel continues to misrepresent" the testimony "to a degree closely approaching sanctionability" (*ibid.*) by transforming it in an erroneous and grossly misleading manner, and that it was obvious that the accountant did not, in reality, assert that he had advised petitioners that it was not necessary to file the returns on time (*id.* at 2a-4a). The court reiterated that, in concluding that the accountant did not advise petitioners that they need not file timely returns, the court had reviewed all the evidence in the light most favorable to petitioners, including the testimony in question, "but read[] it realistically nonetheless" (*id.* at 4a).

ARGUMENT

The court of appeals correctly held that petitioners failed to raise a genuine issue of fact as to whether their failure to file timely 1978 and 1979 federal income tax returns was due to reasonable cause. That fact-bound decision is based solely on the unique circumstances of this case. The decision does not conflict with decisions of this Court or of other courts of appeals. Further review by this Court is therefore not warranted.

1. Section 6651(a)(1) of the Internal Revenue Code imposes a civil penalty for a taxpayer's failure timely to file a tax return unless the taxpayer establishes that such failure was due to reasonable cause and not due to willful neglect. Petitioners contend that they had reasonable cause for the late filing of their 1978 and 1979 income tax returns because their accountant advised them that, in the circumstances, it would be proper for them to file the returns late. Because petitioners proffered no evidence indicating that the accountant in fact offered such advice, the grant of summary judgment to the government was correct.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). In this case, each party moved for summary judgment in the district court. A deposition of petitioner and a deposition and affidavit of his accountant were filed with the court. Petitioners contend (Pet. 14-15) that a statement made by the accountant in his deposition raises a genuine issue whether he advised petitioners to file their returns late.

The court of appeals, however, conducted a *de novo* review of all the evidence and, viewing it in the light most favorable to petitioners, concluded that the evidence does not support the claim that the accountant advised petitioners that it would be proper to file the returns late (Pet. App. 20a-27a). The court held that the evidence showed only that the CPA was unwilling to prepare and sign *incorrect* tax returns, a

fact that does not establish reasonable cause for late filing (Pet. App. 26a-27a). The court of appeals therefore affirmed the grant of summary judgment to the government (Pet. App. 27a).

Counsel for petitioners erroneously represents to this Court (Pet. 14, 15) that the accountant, in answer to the question whether he advised petitioners they could file late, stated "I am certain that I said that." On this basis, petitioners contend (*ibid.*) that this answer, so characterized, created a genuine issue of fact as to whether the accountant advised them that it was not necessary to file the returns in a timely manner. Petitioners pressed this same contention before the court of appeals after that court had rendered its decision (App., *infra*, 2a-4a). In response, the court of appeals observed that petitioners' transformation of the accountant's answer was misleading "to a degree closely approaching sanctionability" (*id.* at 2a). The court properly concluded that the accountant's statement, read in proper context, cannot be construed as an assertion that he advised petitioners that it would be proper to file their returns late (*id.* at 2a-4a).

Further, as the court of appeals noted (App., *infra*, 2a, 4a), petitioners misstate (Pet. 14-16) the holding of that court. The court of appeals did not reject or discredit the testimony of the accountant on the "key question" whether he advised petitioners that it would be proper to file the returns late. Instead, the court of appeals reviewed this testimony and the other summary judgment evidence in the light most favorable to petitioners, and properly drew the "inescapable conclusion" that the accountant did not offer such advice (App., *infra*, 2a, 4a).

Since this decision is based on the unique factual circumstances of this case, and does not conflict with decisions of this Court or of other courts of appeals, further review is not warranted.

2. In ruling as it did, the court of appeals did not decide whether reliance on professional advice may constitute reasonable cause for the late filing of a tax return. Because no such professional advice was given in this case, there is no reason to reach petitioners' assertions (Pet. 10-14) on this issue.

Their argument is, in any event, without merit. As in *United States* v. *Boyle*, 469 U.S. 241 (1985), the only question presented in this case was whether there was reasonable cause for petitioners' failure timely to file required federal tax returns. In this case, however, unlike in *Boyle*, there was no factual foundation for petitioners' claim that they relied on professional advice that they need not meet the filing deadlines. Nonetheless, this Court expressly held in *Boyle* that, even if such professional advice had been given, it would not constitute "reasonable cause" for a late filing. *Id.* at 252. Distinguishing the situation where an attorney has reviewed a question of tax law and advised the taxpayer "that it was unnecessary to file a return" (*id.* at 250), the Court noted that "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due" (*id.* at 251). The Court thus concluded in *Boyle* that (*id.* at 252):

> It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1991

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and wife,
SANDRA J. DENENBURG, PLAINTIFFS-APPELLANTS

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Southern District of Texas

[Filed May 20, 1991]

BEFORE GARWOOD and WIENER, Circuit Judges, and VELA*, District Judge.

BY THE COURT:

IT IS ORDERED that appellants' suggestion for reconsideration of the court's previous order of April 22, 1991, denying appeallants' motion for leave to file out of time suggestion for rehearing en banc is DENIED. Just as was the case with appeallants' previous motion for leave to file a suggestion for rehearing en banc out of time, we lack jurisdiction to hear the instant motion. Henceforth the clerk of this

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* District Judge of the Southern District of Texas, sitting by designation.

court shall not accept any attempted filing by or on behalf of appeallants in this matter.

Nonetheless, in as few words as possible, this court shall try to disabuse counsel for taxpayers of his clearly mistaken concept of what has transpired in this appeal. Possibly this third effort to do so shall have the proverbial charm.

This court has not, as counsel suggests, rejected or discredited the taxpayers' CPA plain answer to a "key question" of this case; neither have we refused to accept such testimony. Rather, counsel has misinterpreted the court's reading of the CPA's testimony—admittedly quite different from counsel's reading—as rejecting such testimony. This court has, however, relied heavily on the *total* testimony of the CPA in his affidavit and in his deposition.

Counsel continues to misrepresent the testimony of the CPA. Most telling, on page 5 of counsel's Motion for Leave to File a Suggestion for Rehearing En Banc Out of Time, he transforms—to a degree closely approaching sanctionability—the initial clause of the understandably long, disjointed and rambling answer in the CPA's deposition, into a complete sentence by replacing the initial comma with a period, omitting the required ellipsis, and closing the quotation immediately following the period. Not only is that treatment erroneous, but it is grossly misleading.

The question posed to the CPA in his deposition was, "Did you ever advise [the taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" A person unfamiliar with the entire deposition or, for that matter, unfamiliar with the CPA's full reply to that question, would, upon reading counsel's shameless transformation of the initial clauses of the CPA's

response, assume (as counsel apparently intended) that the CPA answered the question in the affirmative, without qualification. That the CPA answered affirmatively is simply not the case.

Counsel tries to influence the unfamiliar reader to view the improperly truncated clauses as a complete sentence—as though the second "that" were the object of the verb "said" and, more importantly, as an informal, conversationally shortened substitute for the noun clause ". . . that it was not necessary to file the return on time for some reason." Had the CPA's answer been as thus *mis*represented, counsel would be correct and this court might likely have ruled differently. But counsel's version is not what the CPA said.

A proper analysis of the CPA's answer reveals first that the CPA did not truly respond to the question, and second that, by being unresponsive and somewhat evasive, the CPA was actually answering in the negative. The CPA began his response with "I am certain that I said . . ." followed by "that" as the beginning of a noun clause. But, before he completed the noun clause, the CPA inserted the parenthetical, independent clause "and I think it [i.e., what he said] was conveyed to him [the taxpayer], . . ." Having thus interjected the parenthetical thought about whatever he had said having been told to the taxpayer, the CPA completed his answer by repeating the word "that" and finishing the noun phrase as follows: "because of the substantial variation in the way the document was written with the way the books were returned at the corporation, that to file a return, that was materially—and we knew it to be incorrect—was certainly not what we would as a firm propose to do."

But when we translate the CPA's answer from "deposition-ese" and delete the independent clause, his response reads as follows:

> I am certain I said that to file a return which was materially incorrect, because of the substantial difference between the way the document was written and the way that the books were maintained at the corporation, was certainly not what we, as a firm, would propose to do.

As thus gramatically and syntactically reconstituted, the CPA's response simply cannot be construed to support counsel's contention that the CPA or his firm advised the taxpayers that, as a matter of tax law, they need not file a return timely. Conversely, our interpretation of the CPA's answer is supported by reading it in the context of his entire deposition.

Counsel's insistence to the contrary notwithstanding, this court did apply the well recognized standard of review for summary judgment cases by viewing the summary judgment evidence in the light most favorable to the non-movant—but reading it realistically nonetheless.

We close with a caution to counsel for the taxpayers: We admire the favor with which he has represented his client in this case and the tenacity with which he has refused to take "No" for an answer. But we suggest that henceforth counsel temper his fervor and tenacity with professional objectivity and with constant awareness of his role as an officer of this court, particularly when, in briefs and memoranda, he represents quotations as true and complete, as well as when he characterizes the action of the court pejoratively.

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